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 JANE DOE

**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

JANE DOE, an individual,
 Plaintiff,

v.

CALIFORNIA INSTITUTE OF
 TECHNOLOGY, a California
 corporation;
 JOHN DOE, an individual; KEVIN
 GILMARTIN, an individual; and DOES
 1 through 100, inclusive,
 Defendants.

JOHN DOE, an individual
 Counterclaimant,

v.

JANE DOE, an individual,
 Counter-Defendant.

JOHN DOE, an individual
 Cross Claimant

v.

CALIFORNIA INSTITUTE OF
 TECHNOLOGY, a California
 corporation,
 Cross Defendant.

Case No. 2:19-cv-1005-AB-KS

**PLAINTIFF'S OPPOSITION TO
 CALIFORNIA INSTITUTE OF
 TECHNOLOGY'S REQUEST FOR
 INCORPORATION BY REFERENCE**

[Filed concurrently with Plaintiff's
 Opposition to Defendants' Motion to
 Dismiss Plaintiff's Second Amended
 Complaint]

Judge: Hon. André Birotte Jr.
 Date: May 10, 2019
 Time: 10:00 a.m.
 Location: Courtroom: 7B

1 PLEASE TAKE NOTICE that Plaintiff JANE DOE ("Plaintiff") hereby
2 respectfully requests that the Court disregard, strike, and not consider in ruling on
3 Defendants CALIFORNIA INSTITUTE OF TECHNOLOGY ("Caltech") and KEVIN
4 GILMARTIN ("Gilmartin") (together "Defendants") Motion to Dismiss ("Motion") the
5 allegations set forth at Paragraph 6 of the Declaration of Kathrynne Seiden and "Exhibit
6 A" thereto.

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8 In support of their Motion, Defendants impermissibly ask the Court to consider
9 the subject two letters dated June 26, 2018 attached as "Exhibit A" to the Declaration of
10 Kathrynne Seiden ("Letters"). However, it is established that the Court's inquiry into
11 whether a claim may survive a 12(b)(6) motion to dismiss is limited to the allegations
12 in the complaint. *Lazy Y. Ranch LTD v. Behrens, Inc.*, (9th Cir. 2008) 546 F.3d 580,
13 587. While it is true that incorporation by reference is permitted under rare
14 circumstances, there is no basis to do so in this case. Even Defendants' own cited cases
15 demonstrate that the Letters fall outside of the scope of the limited application of the
16 incorporation by reference doctrine. Defendants rely most heavily on *Khoja v. Orexigen*
17 *Therapeutics, Inc.*, (9th Cir. 2018) 899 F.3d 988, in which the court defines
18 incorporation by reference as a judicially created doctrine that treats certain documents
19 as though they are part of the complaint itself. *Khoja* at 1002. The *Khoja* court goes on
20 to discuss its application of the doctrine, citing its own language to establish the
21 following: "[W]e said that a defendant may seek to incorporate a document into the
22 complaint 'if the plaintiff refers extensively to the document or the document forms
23 the basis of the plaintiff's claim.' (citation omitted) How 'extensively' must the
24 complaint refer to the document? This court has held that 'the mere mention of
25 the existence of a document is insufficient to incorporate the contents of a
26 document'" *Id.* (emphasis added.) In *Branch v. Tunnell*, (9th Cir. 1993) 14 F.3d 449,
27 453-54, the court similarly held that incorporation by reference would only be justified
28 in situations where the contents of a document are specifically alleged in a complaint.

Anderson v. Clow (In re Stac Elec. Secs. Litig., (9th Cir. 1996) 89 F.3d 1399 is

1 easily distinguishable from the present case because the *Anderson* plaintiff's entire
 2 complaint is based on the contents of a document, which differs sharply from the basis
 3 of Plaintiff's allegations.

4 It is apparent from precedent that a mention of the existence of a document is not
 5 enough to justify incorporation by reference. In her entire 25-page Second Amended
 6 Complaint, ("SAC") Plaintiff mentioned the existence of **only one of** the Letters **in a**
 7 **single paragraph: ¶34**. This clearly does not meet the *Khoja* court's articulated
 8 threshold for incorporation by reference. Defendants' quotations, which they claim to
 9 be references to the contents of the Letters, actually are not quotations from the Letters.
 10 If Defendants had faithfully compared what Plaintiff alleged in her SAC to the
 11 language in the Letters, this Request for Incorporation by Reference would never have
 12 been filed. In claiming that the Letters say more than what they do, Defendants
 13 improperly attempt to transform their 12(b)(6) into a Motion for Summary Judgment.
 14 Plaintiff does not have the burden to prove her case on a 12(b)(6) motion, which merely
 15 tests the sufficiency of the pleadings. *Lazy* at 857.

16 The *Khoja* court further elucidates its construction of the incorporation by
 17 reference doctrine, saying that "if a document merely creates a defense to the well-pled
 18 allegations in the complaint, then that document did not necessarily form the basis of
 19 the complaint" (*Khoja* at 1002) and "[a]lthough the incorporation-by-reference doctrine
 20 is designed to prevent artful pleading by plaintiffs, **the doctrine is not a tool for**
 21 **defendants to short-circuit the resolution of a well-pleaded claim.**" (*Khoja* at 1003)
 22 (emphasis added.) It is clear that Defendants may not use the incorporation by reference
 23 doctrine in the manner they attempt to do so before this Court.

24 Therefore, incorporation by reference of the purported June 26, 2018 Letters
 25 based on a single reference to the Letters in the SAC ¶ 34 is impermissible. The law on
 26 this matter mandates that a plaintiff specifically reference the contents of a document
 27 before the document may be incorporated by reference. Moreover, consideration of
 28 these Letters would improperly transform Defendants' 12(b)(6) motion into a Motion

1 for Summary Judgment.

2 Therefore, Plaintiff respectfully request that Defendants' Request be denied.

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5
6 DATED: April 16, 2019

THE COCHRAN FIRM – CALIFORNIA

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8 By:



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11 Attorneys for Plaintiff/Counter-Defendant

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